92-1004

No.

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

DUANE BENTON, DIRECTOR OF REVENUE,
STATE OF MISSOURI,
MISSOURI DEPARTMENT OF REVENUE,
AND THE STATE OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the United States retains its common-law right to collect prejudgment interest on debts owed by the States.

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DUANE BENTON, DIRECTOR OF REVENUE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 975 F.2d 511. The opinion and order of the district court (App., *infra*, 17a-37a) is reported at 772 F. Supp. 453. The order of the district court (App., *infra*, 38a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1992. A petition for rehearing was denied on November 6, 1992. App., *infra*, 41a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 11, 96 Stat. 1755-1756, as amended, 31 U.S.C. 3701(c), 3717, and the regulations promulgated thereunder, 4 C.F.R. 102.13(i), are reproduced at App., *infra*, 42a-45a.

STATEMENT

1. On November 3, 1985, the United States contracted with Olin Corporation to manage, operate, and maintain the Lake City Ammunition Plant, which manufactures ammunition for the Army. App., *infra*, 2a-3a, 19a-20a. Pursuant to that contract, the United States agreed to reimburse Olin for the cost of all materials purchased by Olin in the operation of the plant. *Id.* at 3a, 7a, 23a. The contract further provided that title to the materials so purchased would pass to the United States upon delivery. *Id.* at 3a, 20a-21a. From November 1985 until April 1988, Olin made payments of Missouri sales and use taxes on materials purchased pursuant to that contract, and the United States reimbursed Olin for all of those payments. *Id.* at 19a-20a.

2. The United States filed suit against respondents in the United States District Court for the Western District of Missouri, seeking (1) a declaration that the purchases Olin made under its contract with the

United States were not subject to Missouri sales and use taxes under state law; (2) an injunction restraining respondents from attempting to collect such taxes; and (3) a refund of sales and use taxes paid by Olin and reimbursed by the United States. App., *infra*, 19a. The district court granted summary judgment for the United States, holding that Olin's purchases of materials for use in the operation of the plant were not taxable under state law. *Id.* at 18a-38a. Accordingly, the court ordered respondents to refund to the United States some $683,630 in sales and use taxes paid by Olin and reimbursed by the United States, together with prejudgment interest on that amount. *Id.* at 39a-41a.

3. The court of appeals affirmed in part and reversed in part. App., *infra*, 1a-16a. The court affirmed the district court's ruling on the merits, agreeing that the United States was entitled to a refund of sales and use taxes paid by Olin because the transactions at issue were not taxable under Missouri law. *Id.* at 5a-9a. The court reversed, however, the district court's award of prejudgment interest. *Id.* at 9a-11a. Following its decision in *Arkansas by Scott* v. *Block*, 825 F.2d 1254 (8th Cir. 1987), the court held that the Debt Collection Act of 1982, 31 U.S.C. 3701 *et seq.*, abrogated the federal government's preexisting common law right to collect prejudgment interest on judgments entered against a State. In so holding, the court noted the existence of a circuit conflict on that issue and the pendency of a petition for a writ of certiorari raising that issue in *United States* v. *Texas*, No. 91-1729, (filed Apr. 27, 1992, and granted Oct. 5, 1992). App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

This case presents the question at issue in *United States* v. *Texas*, cert. granted, 113 S. Ct. 50 (1992) (No. 91-1729), *i.e.*, whether the United States retains its common-law right to collect prejudgment interest on debts owed by the States. We submit that the court below, like the court of appeals in *United States* v. *Texas*, *supra*, erred in holding that the federal government's common-law right to prejudgment interest on the obligations of state and local government entities was abrogated by the Debt Collection Act of 1982.* A decision for the United States in *United States* v. *Texas* would require a decision for the United States in the instant case.

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* Two other circuits have construed the Debt Collection Act in the same manner as the court below. See *Perales* v. *United States*, 751 F.2d 95, 96 (2d Cir. 1984), aff'g 598 F. Supp. 19, 23-26 (S.D.N.Y. 1984); *Pennsylvania Dep't of Pub. Welfare* v. *United States*, 781 F.2d 334, 341-342 (3d Cir. 1986). The Sixth and Tenth Circuits have reached the opposite conclusion. See *Gallegos* v. *Lyng*, 891 F.2d 788, 795-800 (10th Cir. 1989); *County of St. Clair* v. *United States Dep't of Labor*, 754 F.2d 375 (6th Cir. 1984) (Table).

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States* v. *Texas*, No. 91-1729, and then disposed of in light of the Court's disposition of that case.

Respectfully submitted.

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FEBRUARY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 91-2206WM

UNITED STATES OF AMERICA, APPELLEE

v.

DUANE BENTON, Director of Revenue, State of Missouri; MISSOURI DEPARTMENT OF REVENUE; STATE OF MISSOURI, APPELLANTS

On Appeal from the United States District Court for the Western District of Missouri

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Submitted: January 9, 1992
Filed: September 16, 1992

Before RICHARD S. ARNOLD, Chief Judge, MCMILLIAN, Circuit Judge, and WELLFORD, Senior Circuit Judge.

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* The Hon. Harry W. Wellford, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

RICHARD S. ARNOLD, Chief Judge.

This case involves the disputed payment of Missouri sales and use taxes by a federal contractor, the Olin Corporation. The United States argues that the taxed purchases involved materials which Olin resold to the government. In Missouri, the sales tax applies to sales for retail, a category that does not include sales for resale. As a result, the government argues, these purchases were wrongly taxed, and the United States is entitled to a refund. Missouri contends that these transactions were properly taxable.

The District Court agreed with the United States, holding that it was entitled to a refund of $683,631.26. The Court also awarded the United States prejudgment interest on this amount. *United States v. Benton*, No. 89-0608-CV-W-3, slip op. 3 (W.D. Mo. Mar. 25, 1991). Missouri now appeals, raising several procedural and substantive arguments for reversal. After *de novo* review, as required by *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), we affirm in part and reverse in part.

I.

The facts of this case are uncomplicated. Olin entered into a contract with the United States to operate the Lake City Ammunition Plant in Independence, Missouri. Since November 3, 1985, Olin has operated and maintained the plant under the terms of this contract. The contract requires that Olin purchase the products and materials it needs to perform its contract function, manufacturing ammunition. While Olin does not have to gain the approval of the government when it makes these purchases, it is required to report to the government, and the

majority of its tasks are expressly subject to the direction or approval of an Army contracting officer.

Under the terms of the contract, Olin has the freedom to choose the vendors it would like to do business with. It is not required to solicit bids and choose the lowest bidder. The items that Olin orders are shipped directly to the plant in Independence, with the direction that title is to pass to the United States upon delivery at the plant. Appendix 91, ¶ 9. Olin pays for these purchases with its own money and is then reimbursed by the United States under the terms of the contract. These reimbursements have included the sales and use taxes paid by Olin on these purchases.

II.

Prior to reaching the merits of this appeal, we must confront several procedural claims raised by Missouri. It alleges that the federal courts should not consider the government's claims because (1) federal jurisdiction is prohibited under the Tax Injunction Act, 28 U.S.C. § 1341; (2) the federal government did not have standing to bring this claim; and (3) principles of comity and federalism should cause the federal courts to abstain from hearing this case. We reject these arguments. Only the first and second merit any discussion.

The Tax Injunction Act states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Missouri contends that the Act bars this action by the United States. It argues that

the government is merely standing in the shoes of Olin, and that this case is concerned solely with the determination of state tax-law issues. As a result, it argues that this case properly belongs in the state courts.

At the heart of this dispute lies the contractual relationship between the United States and Olin. To determine whether the transfers between the original vendors and Olin, and the subsequent transfers by Olin to the United States amounted to a "sale for resale" under Mo. Rev. Stat. § 144.010.1(8) (1986), the contract between Olin and the government must be examined. The interpretation of a contract between the United States and another party depends on federal law. *United States v. Jackson County, Missouri*, 696 F. Supp. 479, 484 (W.D. Mo. 1988). In such a situation, the Tax Injunction Act does not bar the United States from seeking a resolution of this federal question in a federal forum. See *United States v. Broward County, Florida*, 901 F.2d 1005, 1008 (11th Cir. 1990) ("Section 1341 does not bar a suit brought by the United States to recover taxes improperly exacted from a contractor performing a federal contract when the United States has paid the State taxes pursuant to its contract with the federal contractor.").[1]

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[1] We also reject Missouri's contention that the Ninth Circuit's opinion in *United States v. California*, 932 F.2d 1346 (9th Cir. 1991), *petition for cert. filed*, No. 91-2003 (U.S. June 12, 1992), divests us of jurisdiction in this case. *California* may be distinguishable, but even if it isn't, we find more persuasive the reasoning of *United States v. Broward County, Florida*, 901 F.2d 1005 (11th Cir. 1990), which allowed the United States to proceed as the proper party in an action in quasi-contract for money had and received in a situation where a federal contractor had been improperly assessed state taxes.

The State argues that the standing of the United States to bring this action is barred by the very terms of the contract with the Olin Corporation. Under the contract, the government was not obligated to reimburse Olin for payments made by Olin to the State that were not properly due because of an exemption from taxes. Here, the whole substantive point of the government's suit is that the transactions in question were exempt. Therefore, the argument runs, the government lacks standing to bring the suit. It should have been brought by Olin. In this event, though, Olin would, by hypothesis, win the case, and Olin would then, presumably voluntarily, turn over the funds to the government, which, in any event, would have an action against Olin to recover them if necessary. We see no reason why such a circuitry of action should be required. Permitting the government to bring this case means that the money ends up in the right place, back with the government, after only one lawsuit, instead of two. No substantive rights are violated. To dismiss this case for lack of standing, accordingly, seems to us a needless procedural exercise. We hold that the United States does have standing, and we now turn to the merits.

III.

The primary issue in this appeal is whether the transactions between the vendors, Olin, and the government, were properly taxable as a "sale at retail" under the Missouri tax code. Mo. Rev. Stat. § 144.020.1 (1986), levies a tax

> upon all sellers for the privilege of engaging in the business of selling tangible personal property

> or rendering taxable service at retail in this state.

A "sale at retail" has been defined by the legislature as "any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. . . ." *Id.* at § 144.010.1(8) (1986). Thus, a "sale at retail" is a transfer for use or consumption which is "not for resale."

The government argues that the materials purchased by Olin were subsequently resold to the United States. It argues that upon receipt from the vendors, Olin immediately transfers title to the United States. This transfer of title, the government posits, renders the initial transfer between the vendors and Olin nontaxable as a sale for resale under § 144.010.1(8). Missouri responds that there is no sale for resale, that the only taxable transaction occurs between the vendors and Olin, and that, although title to the goods passes from Olin to the United States upon delivery, Olin still retains a significant ownership interest in the goods while it uses them to perform under the contract. We hold that Olin did resell the disputed materials to the United States, and thus the initial transaction between the vendors and Olin was not a sale at retail and not taxable.

Under Missouri law, the sales tax is paid by the purchaser of the goods. *State ex rel. Thompson-Stearns-Roger v. Schaffner*, 489 S.W.2d 207, 215 (Mo. 1973); Mo. Rev. Stat. § 144.060 (1986). The Supreme Court has determined that a "purchaser" is the person who orders the goods and either pays for

them or is legally obligated to pay for them. *Alabama v. King & Boozer*, 314 U.S. 1, 10 (1941). In this case, there is no dispute that Olin was a purchaser of the goods it ordered from the vendors. Our analysis focuses on whether those transactions were final for sales-tax purposes, or whether Olin turned around and resold the goods to the United States. Under the contract between Olin and the United States, the government is required to reimburse Olin for its purchases. Appendix 688, 773. We think this is sufficient to indicate that a resale has taken place.

The Lake City Ammunition Plant is owned by the United States. Olin was hired by the Department of the Army to operate and maintain the plant. It is not an agent of the government, but is instead an independent contractor. Under the terms of its contract, Olin must furnish the equipment, supplies, and materials needed to operate and maintain the plant. To do this, Olin may go out and contract with individual vendors to purchase the materials it needs. It does not need the approval of the United States to pick any specific vendor. However, on the purchase orders, the vendors are informed that title to the goods which Olin purchases is to pass to the United States upon their delivery to the plant. Furthermore, under the terms of the contract, the government is required to reimburse Olin for all purchases of personal property needed for the operation of the plant. After delivery of the items to the plant and payment for the items by Olin, the government reimburses Olin for all of these expenses. The government argues that these facts show a seller/buyer relationship between Olin and the government.

The State argues that despite the transfer of title to the United States, Olin retains an ownership in-

terest in the property because it has dominion and control over it. But whatever interest Olin has in the property, if any, does not prevent the United States from receiving title to the goods. For instance, upon delivery to the plant, the United States is clearly given the power to direct that the goods be shifted to other plants or other projects. It has exercised this power in the past, and Olin is in no position to prevent such a transfer. Furthermore, under the Missouri Department of Revenue's Rule No. 28, "[t]he power to designate who is to obtain title to the property or to physically transfer the property is enough to categorize the person as a seller of the property." 12 C.S.R. 10-3.012(3). This is exactly the position that Olin occupies in this case.

The facts in this case are analogous to those confronted by the Supreme Court of Missouri in *Canteen Corporation v. Goldberg*, 592 S.W.2d 754 (Mo. 1980). In that case, Canteen operated a dining facility for residents of the Council Plaza Retirement Home. *Id.* at 756. Under its contract with Council Plaza, Canteen would bill Council Plaza for the number of meals served per month. Council Plaza, in turn, would bill the residents for the meals that they received. Under the terms of the contract, however, Council Plaza was legally obligated to pay Canteen for the meals regardless of whether or not it received payment. *Id.* The Court found that these transactions amounted to a sale for resale. Initially Canteen would sell the meals to Council Plaza. Council Plaza would then turn around and resell those same meals to the retirement-home residents. The Missouri Supreme Court found that this was not a sale at retail, and thus sales tax could not be imposed.

In this case, the process is similar. Olin contracts with the vendors to purchase goods for the project. Upon receipt of these goods, Olin resells them to the United States, which is obligated under the terms of the contract to pay for them. Under Missouri law, no sales tax will be imposed if the sale is for resale "in any form." Section 144.010.1(8). While these transactions are not a typical resale, we conclude that the passage of title to the United States in exchange for the reimbursement of the purchase price amounts to a resale under Missouri law. Thus, the District Court did not err when it held that the transactions in this case were not subject to sales tax.[2]

IV.

The final issue is whether the government is entitled to prejudgment interest on the amount to be refunded from Missouri.[3] The District Court awarded the government interest, holding that the amount should be calculated using Mo. Rev. Stat. §§ 32.065 and 144.190 (1986). Missouri argues that this was error for two reasons: (1) the United States is not entitled to prejudgment interest on debts owed to it by the States, based upon 31 U.S.C. §§ 3701(c) and 3717, and (2) if the United States is entitled to interest, the District Court erred in applying §§ 32.065 and 144.190 and in not fixing a date when the inter-

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[2] Under Missouri law, if items are exempted from sales tax, they are also exempted from use tax. Mo. Rev. Stat. § 144.615(6) (1986). Therefore, in the present case, Missouri is not entitled to any use taxes.

[3] Missouri also argues that the District Court erred in allowing the government to present "surprise evidence" relating to the amount of taxes paid. This argument is without merit.

est began to accrue. As we agree with the first argument, we decline to address the second.

The Debt Collection Act of 1982, 31 U.S.C. § 3701 *et seq.*, "provides for interest against 'persons' who owe past due debts to the United States." *Texas v. United States*, 951 F.2d 645, 649 (5th Cir.), *petition for cert. filed*, No. 91-1729 (U.S. April 27, 1992). Section 3701(c) of the Act excludes an agency of a state government from the definition of the term "person" in § 3717. The question here is whether this Act abrogated the common-law rule allowing the federal government to collect interest from Missouri in this case. We hold that it did.

Before the enactment of the Debt Collection Act, the United States had the right, under federal common law, to receive interest on debts owed to it by the States. See *West Virginia v. United States*, 479 U.S. 305 (1987); *Rodgers v. United States*, 332 U.S. 371 (1947). Since the Act was enacted, several circuits have addressed its effect on the common-law right to receive interest from the States. The majority has held that this right no longer exists absent specific statutory language to the contrary. See *Arkansas by Scott v. Block*, 825 F.2d 1254 (8th Cir. 1987); *Perales v. United States*, 598 F. Supp. 19 (S.D.N.Y.), *aff'd*, 751 F.2d 95 (2d Cir. 1984) (per curiam); *Pennsylvania v. United States*, 781 F.2d 334 (3d Cir. 1986); *Texas*, *supra*. Only the Tenth Circuit has held to the contrary. *Gallegos v. Lyng*, 891 F.2d 788 (10th Cir. 1989). The Eleventh Circuit has avoided this question. See *Florida Department of Labor v. United States Department of Labor*, 893 F.2d 1319 (11th Cir.), *cert. denied*, 111 S. Ct. 49 (1990).

While this issue has stirred up much controversy, we are bound by our panel's decision in *Arkansas by Scott*. "By enacting a statute that explicitly denies the federal government authority to charge interest on debts owed it by the states, Congress abrogated any pre-existing common law right." *Arkansas by Scott*, 825 F.2d at 1258. We have been directed to no subsequent development that would persuade us to hold otherwise. Thus, we hold that the District Court erred in awarding prejudgment interest to the United States.

The judgment of the District Court is affirmed in part and reversed in part. The cause is remanded to that Court with instructions to enter a new judgment in accordance with this opinion.

It is so ordered.

WELLFORD, Senior Circuit Judge, dissenting.

One of the clauses in the contract between the United States and Olin relates to "allowable cost and payment." *See* Contract Part II—Section I, ¶ 2, clause 14 (incorporating Federal Acquisition Regulation ("FAR") 52.215-7 (APR 1984)). The contract incorporates FAR 32.205-41 by reference, which provides in pertinent part:

> (a) The following types of costs are allowable:
>
> (1) Federal, State, and local taxes (see part 29), except as otherwise provided in paragraph (b) below that are required to be and are paid or accrued in accordance with generally accepted accounting principles.
>
> . . .

> (b) The following types of costs are *not* allowable:
>
> . . .
>
> (3) *Taxes from which exemptions are available to the contractor directly*, or available to the contractor based on an exemption afforded the Government . . . . The term *Exemption* means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise.

(emphasis added). Therefore, assuming that Olin initially was exempt from paying the taxes at issue as the government now contends, such taxes *paid by Olin* to the State of Missouri were *not* reimbursable or "allowable" costs under the contract.[1] If no contractual agreement bound the United States to reimburse Olin for the taxes, then the United States has no basis on which to establish direct injury resulting from the actions of the State of Missouri, *i.e.*, standing, in this suit. I, therefore, find the decision of the district court to be in error.

The majority raises the issue of standing as one of the two procedural claims that warrants discussion,

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[1] It is fairly clear that the United States claims that it is exempt from taxation because the goods sold to Olin were not "sales at retail" under Mo. Rev. Stat. § 144.020.1 (1986). The government does not claim that the tax imposed in this case was unconstitutionally discriminatory or unconstitutional as applied. The tangled issue of whether sovereign immunity extends to contractors who supply the government is, therefore, not reached in this case. For a discussion of that difficult issue, see *United States v. New Mexico*, 455 U.S. 720 (1981).

but it does not directly address the issue in its analysis. Further, it does not acknowledge the error in the district court's reasoning with regard to standing. The district court adhered to its earlier finding, published at 729 F. Supp. 671, that the United States had properly established standing. That finding reads in pertinent part:

> [The United States] counters that it has suffered a direct pecuniary injury as a result of the imposition of Missouri sales and use taxes on Olin, because "[a]ny sales and use taxes assessed or imposed under Missouri law on Olin in its performance of the Contract have in the past and would be in the future paid from the funds of the United States in accordance with the provisions of the Contract." Plaintiff's Complaint § 15. The contract requires the federal government to reimburse Olin for all *purchases* of tangible personal property made pursuant to the contract.
>
> • • •
>
> The Court finds that the United States has alleged actual direct pecuniary injury *resulting from its obligation to reimburse Olin for purchases of personal property made pursuant to the contract.* . . . Accordingly, the Court finds that the United States has standing to assert jurisdiction and is a proper party to bring this action.

United States v. Benton, 729 F. Supp. 671, 673 (W.D. Mo. 1990) (emphasis added). In sum, the district court found that standing was established based on the government's contractual obligation to

reimburse Olin. As explained above, however, the government was under no contractual obligation to reimburse Olin for those disbursements if Olin was initially exempt from paying those taxes.[2] Thus, absent a contractual obligation to Olin, in my view the government has no basis on which to establish standing. That the government may have erroneously allowed and repaid the taxes does not, in my view, give the United States standing to correct the situation by seeking a refund directly from the State of Missouri.[3]

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[2] The United States bases its substantive claim on the theory that *Olin* was *exempt* from paying the sales and use taxes in the first instance. If Olin were exempt as the government contends, I would conclude that the United States is procedurally barred from bringing this suit for lack of standing because it had no contractual obligation to reimburse Olin for those payments. If Olin were *not* initially exempt from paying those taxes, then the United States would fail on the merits of its claim. In reaching my ultimate conclusion, I assume, without deciding, that Olin was exempt from paying the taxes at issue.

If I were to reach the merits of the government's claim, however, I would agree with the majority that under these particular circumstances, there was a resale of personal property from Olin to the United States. *See Canteen Corporation v. Goldberg*, 592 S.W.2d 754 (Mo. 1980). It is noteworthy that Canteen Corporation, who occupied the analogous position of Olin in this case, sued for the refund in that controversy.

[3] The United States might appropriately seek a refund from Olin, but Olin is the proper party to seek recourse, at its own expense, from the State of Missouri. As a practical and public policy matter, this conclusion reaches the better result. In freeing the United States from paying taxes from which Olin is exempt, the contract implicitly places the burden on Olin to recover any taxes that it might erroneously pay to the state. If the government could proceed as the plaintiff in

In addition, the cases on which the district court relied are distinguishable from the instant case. *See United States v. DeKalb County*, 729 F.2d 738 (11th Cir. 1984); and *United States v. Virginia*, 500 F. Supp. 729 (E.D. Va. 1980).[4] Those cases involved suits by the United States to recover taxes from state government, which taxes were paid by the United States indirectly through reimbursement pursuant to contractual obligations. In each case, the court found that the United States had standing to sue based on its contractual obligation to pay the taxes. *DeKalb*, 729 F.2d at 740 (the contract provided that the U.S. "would be responsible for all property taxes assessed against Bankers Life in connection with the property during the aforementioned term."); *Virginia*, 500 F. Supp. at 731 ("[T]he United States has a direct

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suits such as this, there would be no incentive for federal contractors in Olin's position to challenge the taxes. Certainly this result was not intended by the contract.

[4] The court also cited *United States v. Nevada Tax Comm'n*, 439 F.2d 435 (9th Cir. 1971), but that case is inapplicable here. In *Nevada Tax Comm'n*, the United States was asserting its sovereign immunity from state taxation. The court held that the United States had standing because "'[t]he action . . . is essentially to establish the right of the [U.S.] and those with whom it deals to be relieved from an unconstitutionally discriminatory tax and to assert the constitutional immunity of the [U.S.] from taxation by the state.'" *Nevada Tax Comm'n*, 439 F.2d at 438-439 (quoting *United States v. Bureau of Revenue of New Mexico*, 291 F.2d 677, 678-679 (10th Cir. 1961); *see also Marguardt Corp. v. Weber County*, 360 F.2d 168 (10th Cir. 1966) (when United States claimed sovereign immunity, court found that "upon payment of the tax pursuant to its contractual obligation, the government became the real party in interest . . . ."); *see generally supra* note 1.

interest in this controversy because of its obligations under its cost-reimbursement contract."). In the case at bar, the United States was under no such contractual obligation, assuming that Olin is directly exempt from the taxes at issue. Therefore, the cases relied on by the district court are inapposite.

Under this suggested rationale, I find it immaterial that, as stated by the majority, "under the contract between Olin and the United States, the government is required to reimburse Olin for its *purchases*." (emphasis added). That may be so, but the government is not contractually required to reimburse Olin for sales and use taxes mistakenly paid by Olin on those purchases.

I need not consider the applicability of the Tax Injunction Act in the absence of standing. Also, in the absence of standing, I need not reach the prejudgment interest issue.

I would reverse and respectfully dissent.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0608-CV-W-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DUANE BENTON, Director of Revenue, State of Missouri; MISSOURI DEPARTMENT OF REVENUE; and STATE OF MISSOURI, DEFENDANTS

[Filed Oct. 26, 1990]

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiff's and Defendants' motions for summary judgment. Fed. R. Civ. P. 56(c) states that a motion for summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A moving party for summary judgment must "establish the right to judgment with such such clarity that there is no room for controversy." *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). The material facts in this case are undisputed.

In its complaint, the U.S. seeks:

> a] a declaratory judgment that the State of Missouri is prohibited from imposing Missouri sales and use taxes on purchases of tangible personal property by Olin Corporation, a contractor of the United States, for the operation of the Lake City Army Ammunition Plant because the purchases were for the purpose of resale to the United States and are not subject to Missouri sales and use taxes;
>
> b] injunctive relief prohibiting the defendants and all those acting in concert with them from imposing or collecting Missouri sales and use taxes on the sale and use of property purchased by Olin for the operation of the Plant; and
>
> c] a refund of sales and use taxes paid by Olin on its purchases of tangible personal property for the operation of the Plant.

Defendants previously filed two motions to dismiss. Both were denied. The U.S. contends Olin is exempt from sales and use taxes because it is the operator of a U.S. owned munitions plant and the property is purchased for resale to the United States Army.

The plant is a government owned manufacturing facility located in Independence, Missouri, and manufactures ammunition for the U.S. and its allies. Since November 3, 1985, the plant has been operated and maintained by Olin pursuant to the terms of its contract with the Army. Olin is an independent contractor charged with the operation, management and maintenance of the plant as the Army directs and is not an agent of the U.S. Olin made payments of

Missouri sales and use taxes between November 1985 and April 1988, all of which were reimbursed by the U.S.

The contract is a cost plus award fee contract where Olin receives an annual fee for operation and maintenance of the plant and reimbursement for its costs of operating the plant. The annual fee is divided into two portions. The first portion is a base fee, which is approximately 15% of the total fee potential and is paid in 12 monthly payments and represents a 'fixed fee.' It is negotiated in advance and based upon the forthcoming year's projections. The second portion of the annual fee is an award fee and is paid annually. It is based on the Army's evaluation of Olin's operation and management of the plant.

Instead of providing a final manufactured product for the Army, Olin furnishes personnel to manage and operate the plant. The Army reimburses Olin for salaries and other allowable personnel costs. Olin furnishes all equipment, supplies, and materials to operate and maintain the plant as prescribed in the contract. Olin is not required to obtain the U.S.'s specific approval for each transaction, and has the discretion to remove the amount of property from inventory that is needed to perform the contract. Olin must report to the U.S. and most tasks are expressly subject to the direction or approval of the Army's Contracting Officer. Olin issues checks from its account to pay for the property and is reimbursed by the United States for funds expended.

Although Olin executes contracts for the purchase of all tangible personal property needed for the operation of the plant in its own name, the contract provides that the title to the property passes directly to

the U.S., incorporating by reference Federal Acquisition Clause 52.245-05. Thus, Olin never holds title to the property purchased. The purchase orders which Olin places with third party vendors also provide for the passage of title to the U.S., consistent with the contract.

I. *PROCEDURAL ISSUES*

Defendant contends that Plaintiff is an improper party, and argues that Olin purchased the property in question and resold it for cost to the U.S., thus Olin is the proper party to bring this suit. The sales tax was collected from Olin on its purchases from third party vendors. No sales tax was collected from the United States on its reimbursement of Olin's purchases. Section 144.190.2, RSMo. 1986, provides that the entity under Missouri tax law who is required to remit taxes is the seller of tangible personal property and the U.S. is not a seller. Missouri concludes that the U.S. is not the proper party to receive a refund. Additionally, Missouri contends that the U.S. has not followed § 144.190.3, RSMo. 1989, which provides that "Every claim for refund must be in writing under oath, and must state the specific grounds upon which the claim is founded."

These arguments are premised on a state law action for refund. In an action brought by the U.S. against a county to recover a refund of ad valorem taxes paid by mistake by the U.S. and its contractor, the Eleventh Circuit held:

> In contending that the district court was without subject matter jurisdiction because prior to 1975 payments of taxes were voluntarily made

> and therefore the administrative procedure provided by the Georgia statute was ignored, the county misconceives the theory of the Government's claim. It was not posited upon state law, comm[illegible]or statutory, but upon Federal law. Its action sounded in quasi-contractus for the recovery of its treasury funds paid by mistake which resulted in the unjust enrichment of the county. Neither voluntary payment nor the failure to exhaust state administrative remedies was available as a defense to its claim.

United States v. DeKalb County, 729 F.2d 738, 741 (11th Cir. 1984).

Where the U.S. seeks a refund of state taxes erroneously collected from a federal contractor and paid by the U.S., the U.S. is bringing an action in *indebitatus assumpsit*, or quasi-contract, for money had and received, and is not bringing a state law cause of action for refund of taxes. *See U.S. v. Broward County*, 901 F.2d 1005 (11th Cir. 1990); *U.S. v. Michigan*, 851 F.2d 803 (6th Cir. 1988); and *New Orleans v. U.S.*, 371 F.2d 21 (5th Cir. 1967), *cert. denied*, 387 U.S. 944, 87 S. Ct. 2076 (1967), *reh. denied*, 389 U.S. 890, 88 S. Ct. 19 (1967). Under federal common law principles, the U.S. has the right to sue for the recovery of funds paid from the federal treasury, whether or not any specific state statute authorizes the suit. *DeKalb County*, 729 F.2d at 741, n.4. "The interpretation of a contract between the United States and another party is a federal issue." *U.S. v. Benton*, 729 F. Supp. 671, 673 (W.D. Mo. 1990).

The U.S. is the proper party to bring a quasi-contractual action for money had and received where

its contractor has wrongly paid over taxes to a state or political subdivision and the United States has reimbursed the contractor. *See DeKalb County*, 729 F.2d at 738; *U.S. v. Nevada Tax Comm'n*, 439 F.2d 435 (9th Cir. 1971); and *Marquardt Corp. v. Weber County*, 360 F.2d 168 (10th Cir. 1966). Similarly, federal courts have held that the U.S. need not exhaust state administrative procedures, such as presenting a claim for refund in writing, prior to bringing a federal quasi-contractual action. *DeKalb County*, 729 F.2d at 741. The United States' claim will not be dismissed because the U.S. failed to follow § 144.190.3, RSMo. 1986.

Further, this Court previously held that the U.S. demonstrated it suffered direct pecuniary injury as a result of the imposition of the Missouri sales and use taxes on Olin's purchases of tangible personal property, where the contract required the U.S. to reimburse Olin for all purchases of property. *Benton*, 729 F. Supp. at 673. Thus, the U.S. is a proper party; does not lack standing; and need not resort to State courts to obtain relief. *Id.* at 673-76.

Defendants contend the U.S. is procedurally barred from receiving at least a portion of its claimed refund because section 144.190.2, RSMo. 1989, provides:

> No . . . credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from the date of overpayment.

The federal doctrine of sovereign immunity bars the application of state statutes of limitations brought by the United States. *Badaracco v. Commissioner*,

464 U.S. 386, 400 n.10, 104 S. Ct. 756 (1985). Further, 28 U.S.C. § 2415(a), (1980), provides that "every action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues." This suit was filed on June 23, 1989, and the period for which the United States seeks a refund is subsequent to June 23, 1983, thus this action is not precluded.

II. IMPOSITION OF SALES TAX

Taxing stautes must be construed strictly, and taxes will not be assessed against the United States unless they are expressly authorized by law. *St. Louis Country Club v. Administrative Hearing Comm'n*, 657 S.W.2d 614, 617 (Mo. banc 1983). It is unconstitutional under *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), for a state to directly tax the United States or one of its instrumentalities. *See also United States v. County of Fresno*, 429 U.S. 452, 97 S. Ct. 699 (1977). This rule is designed to prevent the states from imposing restraints on the constitutional function of the United States by "hamstringing its power;" interfering with its property; or discriminating "against the Federal Government, its property or those with whom it does business." *Detroit v. Murray Corporation of America*, 355 U.S. 489, 510, 78 S. Ct. 458, 2 L.Ed.2d 441 (1958). In the absence of Congressional exemption, the Supreme Court determines if the legal incidence of the state tax has been placed on the United States, its property or one of its instrumentalities. *United States v. Forst*, 442 F. Supp. 920, 923 (W.D. Va. 1977), *aff'd* 569 F.2d 811 (4th Cir. 1978).

"The Supreme Court has made it explicit that the contracting parties—that is, the United States and its contractor, have the power, when Congress has not waived governmental immunity, to prevent the state taxation on the sales by altering the form of their contract to make the contractor the purchasing agent of the United States with the authoriy to bind the credit of the United States." *Forst*, 442 F. Supp. at 924, citing *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122, 74 S. Ct. 403 (1954). Additionally, if the U.S. had directly paid the third party vendors for the property delivered to its plant, this case would be moot.

Section 144.020.1, RSMo. 1986, imposes a tax:

> upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state.

The Missouri legislature has defined "at- retail" as:

> any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration . . .

§ 144.010.1(8).

In essence, § 144.010.1(8) sets forth the requirements for a sale "at retail" as a transfer which is (1) for use or consumption and (2) not for resale. *See Odorite of America, Inc. v. Director of Revenue*, 713 S.W.2d 833, 836-37 (Mo. banc 1986).

III. "RESALE"

The U.S. contends Olin's purchases of tangible personal property are for the sole purpose of reselling the property to the U.S. The U.S. and Olin have contracted that title passes directly from the vendor to the U.S. upon delivery of the tangible personal property, whether delivery occurs at the shipping point or at the plant. Olin's purchase orders provide for title passage to occur upon delivery. The U.S. contends that title passage governs when a retail sale occurs, and, here, title passes upon delivery. The U.S. asserts that both the parties' intent and the completion of performance evidence that Olin's resale to the U.S. takes place upon delivery at the plant. At that time, title passes to the U.S., and a retail sale occurs. The U.S. concludes that since Olin has the power to designate the U.S. as the party to whom the vendor transfers title, Olin is a seller, and a sale takes place upon delivery.

The legal incidence of the Missouri sales tax falls upon the purchaser of tangible personal property. *See* § 144.060, RSMo. 1986. Missouri seeks to impose a sales tax on Olin for its purchases. Here, Olin pays the purchase price of the property and the sales tax and Olin is subsequently "reimbursed" by the U.S. for the purchase price and sales tax. The question becomes whether Olin resells the property to the United States. *See* § 144.010.1(8). This Court previously stated:

> The applicable Missouri statutes are unambiguous. It is the contractual relationship between the United States and Olin that lies at the heart of this case. Only by interpreting and construing that relationship can the Court determine

> whether Missouri can lawfully require Olin to pay sales and use taxes on personal property purchased pursuant to the contract.

United States v. Benton, 729 F. Supp. 671, 675 (W.D. Mo. 1990).

Although Missouri statutes do not define "resale,' they do define "sale." The definition of "sale" in the use tax statutes is applicable to the definition of "resale." *Smith Beverage Co. v. Reiss*, 568 S.W.2d 61, 63 (Mo. banc 1978). Section 144.010.1(7), RSMo. 1986, defines sale as:

> any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration . . .

The purchaser of items sold is defined by the U.S. Supreme Court as the person who orders the goods and either pays for them or is legally obligated to pay for them if the sale is on credit. *Alabama v. King & Boozer*, 314 U.S. 1, 10, 62 S. Ct. 43 (1941) (upholding the state tax, finding that the contractors were to purchase in their own names and on their own credit and that the Government was not bound by their purchase contract). Defendants and plaintiff concur that Olin has made a purchase of the property. The U.S. is obligated, per contractual agreement, to reimburse Olin for this purchase.

State ex rel. Thompson-Stearns-Roger v. Schaffner, 489 S.W.2d 207 (Mo. 1373), is discussed in depth by both parties, each having a much different analysis of the case. This case involves the activities of two joint venture, independent contractors for the United States. Both entered into cost-plus-fixed fee contracts with the U.S. Pursuant to its contract with the U.S.,

Thompson-Searns-Roger was to rehabilitate, convert and construct facilities for the manufacture of a defoliant. Mason-Rust, the other contractor, was contractually obligated to perform the same services at another plant.

Pursuant to their respective contracts, the contractors purchased a variety of tools, materials, construction supplies and other tangible personal property. Upon approval by a government representative at the site, bids were solicited. When the bids were approved, a purchase order was awarded. The property was shipped directly to the government job site where the government representative inspected it and gave his approval. Both contracts provided that title and risk of loss passed directly from the vendor to the U.S. upon delivery. All property was invoiced by the vendor to the contractor. The contractor paid the invoice and was reimbursed by the U.S. *Id.* at 212-14.

The contractors argued that they were not "purchasers" liable for the sales tax under the Missouri sales tax statutes, *Id.* at 214, whereas Olin concedes it is a purchaser and argues it resells tangible personal property to the U.S. The Court held that the contractors "largely overlooked the alternative transfer of 'ownership' as giving rise to a taxable transaction" and the contractors had such dominion over the property as enabled them to designate the transferee of the "title," and were therefore "purchasers." *Id.* at 215. The Court concluded that the legislature must have intended the "myriad of transactions where the purchase price is paid by one who does not receive technical legal title but who exercises dominion over the property to be transaction subject to sales tax." *Id.* "No other reasonable explanation for the

use of the alternative term [ownership] appears." *Id.* Thus, the purchase of an ownership interest, i.e., such dominion over property to designate the transfer of title, is a taxable retail sale pursuant to *Thompson-Stearns-Roger*. However, if the purchase is for resale, then it is not a taxable retail sale. *See* § 144.010.1(8).

Missouri argues that Olin's transfer of title is not a resale because Olin retains an ownership interest, because Olin still manages and operates the plant at which the property at issue is employed. *Thompson-Stearns-Roger* did not address whether the contractor resold the tangible personal property to the U.S. The U.S. goes one step further and argues Olin resells the property to it. Thus, this is a question of first impression in the State of Missouri.

Arguably, Olin has an interest in the property. Missouri finds it conclusive that Olin manages and operates the plant which in effect means that Olin manages and operates the tangible personal property, whose title is vested in the U.S. To the extent Olin has an interest in the property, its interest is subservient to that of the United States', which is contractually obligated to pay Olin for the property. Olin's control is subservient to that of the U.S. "The (sales) tax is imposed upon sales for use or consumption. That means use or consumption by the purchaser." *Berry-Kofron Dental Laboratory Co. v. Smith*, 345 Mo. 922, 137 S.W.2d 452, 456 (Div. 2 1940).[1] After title passes, Olin merely accesses the

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[1] The court rejected the Department of Revenue's contention that the dentist used or consumed a denture by placing it in his patient's mouth as part of his professional services. The court held that the denture was ordered for the patient,

property to perform its contractual obligations. This retained interest is de minimis and insufficient to hold that a resale did not occur. The statute specifically states a "resale in any form." Undoubtedly, Olin's sale is in a form different than that of many other sales, since Olin manages and operates the plant in which the property is employed. However, this does not preclude the "form" of "resale" the U.S. and Olin envision from occurring.[2] In effect, defendants are contending Olin uses something it has resold.[3]

Missouri cites 12 C.S.R. 10-3.262(2), which provides:

> Persons selling tangible personal property to contractors with the United States government or

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who is the user and consumer. Here, the U.S. is the ultimate user and consumer of the tangible personal property. In fact, if anyone uses the property, it is the U.S. *Chrysler Corp.*, 114 So.2d at 584-86; *General Motors Corp.*, 320 P.2d at 812; *Tawes*, 124 A.2d at 814. The legislature subsequently amended the statute, stating that tangible personal property made by dentists and used in their profession shall be deemed to have been purchased for use or consumption, and, hence, taxable.

[2] This Court's holding is consistent with other Court's. *See Chrysler Corp. v. New Orleans*, 114 So.2d 579 (1959); *General Motors Corp. v. State Comm'n of Revenue and Taxation*, 182 Kan. 237, 320 P.2d 807 (1958), *cert. denied*, 358 U.S. 875 (1958); *Avco Mfg. Corp. v. Connelly*, 145 Comm. 161, 140 A.2d 479 (1958); and *Tawes v. Aerial Products, Inc.*, 210 Md. 627, 124 A.2d 805 (1956).

[3] Missouri cites *R&M Enterprises, Inc. v. Director of Revenue*, 748 S.W.2d 171 (Mo. banc 1988) and *Odorite of America, Inc. v. Director of Revenue*, 713 S.W.2d 833 (Mo. banc 1986). Neither of these cases involve a resale. In neither case does the purchaser transfer title or ownership for consideration as Olin transfers to the U.S.

> its agencies, the state of Missouri or Missouri political subdivisions, are subject to the sales tax on all sales, regardless of, to whom the contract or purchase order designates title is to pass.

Missouri statutes provide that sales tax will be imposed on retail sales, § 144.020.1, RSMo. 1986, which are defined as a transfer of tangible personal property to the purchaser, for use or consumption and not for resale. § 144.010.1(8), RSMo. 1986. To the extent there is a conflict between 12 C.S.R. 10-3.262(2) and § 144.020.1, RSMo. 1986, the statute controls. Thus, Olin's purchases are taxable to the extent they are not for resale. § 144.010.1(8), RSMo. 1986.

The definitions of "purchaser" and "seller" are substantially similar. *Cf.* §§ 144.010.1(6) and (9), RSMo. 1986. Missouri Department of Revenue's Rule No. 28, compares the terms "purchaser" and "seller:"

> It is not necessary for a person to have an ownership interest in or title to the tangible personal property transferred to the purchaser for that person to be considered a seller under the Missouri state sales tax laws. The power to designate who is to obtain title to the property or to physically transfer the property is enough to categorize the person as a seller of the property.

12 C.S.R. 10-3.012(3).[4]

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[4] Missouri argues that this is only applicable to auctioneers. The regulation's stated purpose is to interpret "the sales tax law as it applies to persons selling tangible personal property at auctions for unknown principals and" *and* [*sic*] to interpret and apply §§ 144.010.1(8) *and* (9) and 144.020, RSMo. 1986 (emphasis added). The stated purpose clearly provides that it is not only applicable to auctioneers but is also applicable

Olin pays the third party vendor and is subsequently reimbursed by the U.S. Olin instructs the vendor, through its purchase order, to transfer title to the U.S. Only Olin is bound by the purchase order. Olin admits it is a purchaser and designates the transfer of title to the U.S. at the point of delivery. The U.S. correctly contends this creates a retail sale. 12 C.S.R. 10-3.0112(3) indicates that Olin's power to designate that the U.S. is the entity to receive title is sufficient to characterize it as a seller, and thus a resale occurs, pursuant to § 144.010.1(8), RSMo. 1986.

Missouri cites *United States v. Forst*, 442 F. Supp. 920, 924 (W.D. Va. 1977), which held that "it is not critical who holds title to the purchased items as between the United States and its contractor. Nor is the degree of control over the contractor that the United States exercises with respect to the purchases critical. The key factor is whose credit, between the United States and the contractor, is bound by the purchasing agreement with the seller."

In *Forst*, the district court found that the resale exemption in Virginia's statutes was "designed only to prevent multiple sales tax incidence for the same tangible personal property," *Forst*, 442 F. Supp. at 925, and that the government contractor was the final consumer-purchaser of the tangible personal property. As in this case, the government contractor never had legal title to the items for which it was reimbursed fully by the U.S. However, the items were "purchased by the government contractor for its consumption in the performance of its contract

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to the interpretation of §§ 144.010.1(8) and (9) and 144.020, RSMo. 1986.

with the United States. . . . We cannot say that any of these items were 'resold' to the United States." Here, Olin exercises substantial control over the procurement of the property and its sole credit was involved in the purchases from vendors. Thus, under *Forst*, Olin's purchases would be taxable. This Court declines to follow *Forst*, but instead follows the holdings of the vast majority of other courts addressing this issue.

In *Comptroller of Treasury v. Glenn L. Martin Co.*, 216 Md. 235, 140 A.2d 288 (Md.), *cert. denied*, 358 U.S. 820 (1958), the contractor entered into contracts with the Navy and Air Force to purchase facilities and equipment to manufacture airplanes and weapons. Title to the property was to pass upon delivery. The contractor used the purchased facilities and equipment free of charge to manufacture munitions and airplanes for the U.S. *Id.* at 290. The Maryland court held that the sale to the contractor was a sale-for-resale, because title vested with the government upon delivery of the property, pursuant to the contractor's contracts with the government and the government's reimbursement of the contractor. The right of the U.S. to reject the goods was not a material factor. *Id.* at 292. In *Martin*, the taxpayer was selling a finished product to the U.S., whereas Olin has no obligation to deliver a finished product to the U.S.

State Tax Comm'n v. Graybar Elec. Co., 86 Ariz. 253, 344 P.2d 1008, 1012 (1959), had similar facts, and the Court held that since the property was "used as directed by the United States and the title thereto was in the Government, it can be logically concluded that the initial acquisition by Grand Central was

either as an agent of the Government or for immediate resale to the Government."

In *Day & Zimmerman, Inc. v. Calvert*, 519 S.W.2d 106 (Tex. 1975), *cert. denied*, 423 U.S. 832 (1975), the contractor had a cost plus award fee contract with the U.S. to operate a government owned plant. As with Olin and the U.S., its responsibilities as operator of the plant included loading, assembling, and packaging of ammunition and related components, and the procurement of all necessary materials, supplies, equipment and services. As with Olin and the U.S., all land and buildings were owned by the U.S. and under the command of a military officer, and the contract had a title vesting clause that called for title to pass directly from the vendor to the U.S. upon delivery. In *Day*, the contractor had the right to assign title, and the U.S. reimbursed the contractor prior to the contractor paying the vendors. Here, the title passes directly from the vendor to the U.S. upon delivery and Olin pays the vendor price to the U.S.'s reimbursement. The Supreme Court of Texas held that a resale occurred because there were two distinct, identifiable transactions. The vendor sold the property to the contractor and the contractor sold the property to the U.S. Thus, a sale for resale had occurred and the sale to the contractor was not a taxable sale. *See Lockheed Aircraft Corp. v. State Bd. of Equalization*, 81 Cal. App.3d 257, 146 Cal. Rptr. 283 (2nd Dist. 1978) and *Martin Marietta Corp. v. Regional Transp. Dist.*, 772 P.2d 668 (Colo. App. 1989), *cert. granted*, 785 P.2d 916 (Colo. 1989), for comparable holdings. All of the above cases, except *Forst*, are consistent with Missouri's goal of taxing the ultimate purchaser, which is the U.S. in this case.

The Missouri Supreme Court has held that the contractual relationship of the parties determines whether and when a taxable event takes place for purposes of the state sales and use tax, and the passage of title is the crucial taxable event for purposes of the sales tax. *State ex rel. Otis Elevator Co. v. Smith*, 357 Mo. 1055, 212 S.W.2d 580, 582 (Mo. banc 1948); *Marsh v. Spradling*, 537 S.W.2d 402, 405 Mo. 1976); and *Kurtz Concrete, Inc. v. Spradling*, 560 S.W.2d 858, 860 (Mo. banc 1978). Section 400.2-401(1), RSMo. 1986, provides that: "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties." If the contract between the buyer and the seller requires delivery at destination, title passes upon tender there. *Id.* at .2-401(2)(b). The contract provides that Olin and the U.S. have agreed that title passes directly from the vendor to the U.S. upon delivery of the tangible personal property at the plant. Additionally, the vendors and Olin have the same agreement in Olin's purchase orders, thus effecting a "resale."

The Missouri Supreme Court addressed an analogous situation in *Canteen Corp. v. Goldberg*, 592 S.W.2d 754 (Mo. banc 1980). There, Canteen rented space from Council Plaza and operated a dining facility for retired people. Canteen billed Council Plaza at a predetermined price per meal for the number of meals served. Council Plaza then billed the retirees for their meals. Council Plaza was legally obligated to pay Canteen for all meals served, whether or not Council Plaza received payment from retirees. *Id.* at 756. The Court held that two transactions took place. Canteen sold meals to Council Plaza for the purpose of Council Plaza selling the meals to the re-

tirees. *Id.* Thus, there was not a taxable sale at retail from Canteen to Council Plaza, just as there is no sale at retail from third party vendors to Olin.

The contract between Olin and the U.S. expressly provides for title passage from third party vendors to the U.S. at the time of delivery. Once title passes, Olin no longer has dominion over the property. The dominion temporarily possessed by Olin to designate the transfer of title makes Olin a seller. 12 C.S.R. 10-3.012(3). Once title passes to the U.S., the U.S. has discretion as to the utilization of that property. The only significant interest Olin possesses is the dominion over the property to designate the transfer of title. *Thompson-Stearns-Roger*, 489 S.W.2d at 215. Thus, a resale is effected, making Olin's purchases of tangible personal property in accord with its contract with the U.S., a nontaxable transaction pursuant to § 144.010.1(8). There "is no question that the General Assembly in enacting the sales tax law intended to place the burden of the tax upon the person paying the purchase price." *Thompson-Stearns-Roger*, 489 S.W.2d at 215. Here, the U.S. directly pays the purchase price.

Missouri argues that the U.S. did not pay for the title and Olin is not compensated for the transfer of the title, thus there is no resale to the U.S. This is incorrect. Olin is reimbursed for all expenses in operating and managing the plant, including the cost of property purchased pursuant to the contract. In addition, Olin is paid a base fee and an award fee under the contract. Section 144.010.1(8) merely requires the transfer to be for "valuable consideration." Whether and if Olin shows a profit on the resale to the U.S., or from the base fee or award fee, this Court need not determine, because a lack of profit

upon resale does not prevent a finding of a purchase for resale. *Glenn L. Martin Co.*, 140 A.2d at 292. Defendants raise numerous other arguments which are without merit and are summarily denied.

A transfer of ownership in tangible personal property is effected from vendors to Olin and a separate transfer of ownership effected from Olin to the U.S., when Olin directs the vendors to transfer title. Section 144.010.1(8) expressly requires a transfer for valuable consideration to be (1) for use or consumption and (2) not for resale in any form. Olin's purchases from vendors are for resale to the U.S., thus the transactions between Olin and vendors are not "at retail," as defined in section 144.010.1(8). Since the transactions are not "at retail," a section 144.020.1 imposition of tax is not applicable to the transfers at issue. This Court need not reach the issue as to whether Olin uses the tangible personal property since Olin resells the property to the U.S.

The U.S. requests this Court to set a schedule for the calculation of remedial relief. The U.S. has stated in its answers to interrogatories and in deposition testimony, the amounts it claims are due. Thus, there is no need to establish a schedule.[5]

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[5] The parties address whether Olin should pay a use tax on the property used at the government owned facility. A tax cannot be imposed on Olin because it resells the property to the U.S. The Missouri Supreme Court has held that when the legislature exempts sales from the sales tax, the legislature clearly evidences a desire to exempt the property from a use tax. *Southwestern Bell Telephone Company v. Morris*, 345 S.W.2d 62, 67 (Mo. banc 1961). "To hold otherwise would practically nullify the obvious legislative intent." *Id.* Thus, in exempting the vendors' sales to Olin from a sales tax, the Missouri legislature obviously intends to exempt the same

Accordingly, it is hereby ORDERED that Plaintiff's motion for summary judgment is GRANTED, and Defendants' motion for summary judgement is DENIED.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
Senior U.S. District Judge

DATED: 10-25-'90

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sales from a use tax. *See* § 144.615(b), RSMo. 1986, which exempts tangible personal property held for resale from taxes levied in §§ 144.600 to 144.745. To any extent Olin "holds" or has an interest in the tangible personal property, it is for the sole purpose of reselling the property to the U.S.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0608-CV-W-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DUANE BENTON, Director of Revenue, State of Missouri; MISSOURI DEPARTMENT OF REVENUE; and STATE OF MISSOURI, DEFENDANTS

[Filed Mar. 25, 1991]

ORDER

This Court previously granted summary judgment in favor of Plaintiff with its October 26, 1990 Order. Before the Court is Plaintiff's Motion to Alter or Amend Judgment pursuant to Fed. R. Civ. P. 59(e) and Defendants' Motion for Reconsideration, and the parties' responses and replies to said motions. Defendants reiterate the same arguments in its motion to reconsider, and to the extent Defendants raise new arguments, they are without merit.

Plaintiff moves the Court to alter or amend its judgment for two reasons: (1) in the interests of intergovernmental harmony and in light of new evidence, to correct the amount of remedial relief sought in the complaint and awarded by the Court in its

October 26, 1990 judgment; and (2) to clarify the judgment of the Court as to the terms of the injunction entered and the precise amount of remedial relief ordered, including the existence and extent of prejudgment interest.

An issue does arise as to whether the United States is entitled to prejudgment interest, as requested in its complaint. The Supreme Court has held that the United States is entitled to prejudgment interest on the debt arising from the contractual obligation to reimburse the United States for disaster relief. *West Virginia v. United States*, 479 U.S. 305 (1987). The Court stated that "[n]o state policy compels any deviation from the longstanding rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a contractual obligation to pay money," and that "[p]rejudgment interest is an element of complete compensation." *Id.* at 310. The amount of prejudgment interest is to be left to the discretion of the trial court. *See Royal Indemnity Co. v. United States*, 313 U.S. 289, 296 (1941).

Pursuant to Mo. Rev. Code, Section 144.190, when Missouri sales tax has been erroneously or illegally collected, the amount is refunded to the taxpayer with interest as determined by Mo. Rev. Code § 32.065. Subsequent to September 1, 1986, the same rate is to apply to Missouri use tax refunds. *See* 1986 Mo. Laws 582 *et seq.* Thus, the interest rate calculated pursuant to Mo. Rev. Code § 32.065, is the interest rate this Court elects to impose on the defendants.

Accordingly, it is hereby ORDERED that the judgment entered on October 26, 1990 is amended and altered as follows:

Defendants, their successors in office, their employees, agents, attorneys, and all persons acting in concert with them who shall receive notice thereof are hereby enjoined from levying, assessing, imposing or collecting Missouri sales or use taxes on purchases of tangible personal property made by Olin Department of the Army for the operation of the Lake City Army Ammunition Plant in Independence, Missouri.

Defendants are further ORDERED to pay to the United States of America the sum of $683,631.26, representing the sum of all payments of sales and use taxes made to Defendants by Olin Corporation upon purchases of tangible personal property for the operation of the Lake City Army Ammunition Plant. It is further ORDERED that Defendants are to pay prejudgment interest pursuant to Mo. Rev. Code §§ 32.065 and 144.190.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
Senior U.S. District Judge

DATED: 3-25-91

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-2206WMKC

UNITED STATES OF AMERICA, APPELLEE

v.

DUANE BENTON, Director of Revenue, State of Missouri; MISSOURI DEPARTMENT OF REVENUE; STATE OF MISSOURI, APPELLANT

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

---

November 6, 1992

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

Order entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk
U.S. Court of Appeals
Eighth Circuit

APPENDIX E

STATUTES AND REGULATION INVOLVED

1. 31 U.S.C.:

§ 3701. Definitions and application

* * * * *

(c) In sections 3716 and 3717 of this title, "person" does not include an agency of the United States Government, of a State government, or of a unit of general local goverment.

* * * * *

§ 3717. Interest and penalty on claims

(a) (1) The head of an executive or legislative agency shall charge a minimum annual rate of interest on an outstanding debt on a United States Government claim owed by a person that is equal to the average investment rate for the Treasury tax and loan accounts for the 12-month period ending on September 30 of each year, rounded to the nearest whole percentage point. The Secretary of the Treasury shall publish the rate before November 1 of that year. The rate is effective on the first day of the next calendar quarter.

(2) The Secretary may charge the rate of interest for a calendar quarter if the average investment rate for the 12-month period ending at the close of the prior calendar quarter, rounded to the nearest whole percentage point, is more or less than the existing published rate by 2 percentage points.

(b) Interest under subsection (a) of this section accrues from the date—

(1) on which notice is mailed after October 25, 1982, if notice was first mailed before October 25, 1982; or

(2) notice of the amount due is first mailed to the debtor at the most current address of the debtor available to the head of the executive or legislative agency, if notice is first mailed after October 24, 1982.

(c) The rate of interest charged under subsection (a) of this section—

(1) is the rate in effect on the date from which interest begins to accrue under subsection (b) of this section; and

(2) remains fixed at that rate for the duration of the indebtedness.

(d) Interest under subsection (a) of this section may not be charged if the amount due on the claim is paid within 30 days after the date from which interest accrues under subsection (b) of this section. The head of an executive or legislative agency may extend the 30-day period.

(e) The head of an executive or legislative agency shall assess on a claim owed by a person—

(1) a charge to cover the cost of processing and handling a delinquent claim; and

(2) a penalty charge of not more than 6 percent a year for failure to pay a part of a debt more than 90 days past due.

(f) Interest under subsection (a) of this section does not accrue on a charge assessed under subsection (e) of this section.

(g) This section does not apply—

(1) if a statute, regulation required by statute, loan agreement, or contract prohibits charging interest or assessing charges or explicitly fixes the interest or charges; and

(2) to a claim under a contract executed before October 25, 1982, that is in effect on October 25, 1982.

(h) In conformity with standards prescribed jointly by the Attorney General and the Comptroller General, the head of an executive or legislative agency may prescribe regulations identifying circumstances appropriate to waiving collection of interest and charges under subsections (a) and (e) of this section. A waiver under the regulations is deemed to be compliance with this section.

2. 4 C.F.R.:

§ 102.13. Interest, penalties, and administrative costs.

* * * * *

(i) *Exemptions.* (1) The provisions of 31 U.S.C. 3717 do not apply: (i) To debts owed by any State or local government;

* * * * *

(2) However, agencies are authorized to assess interest and related charges on debts which

are not subject to 31 U.S.C. 3717 to the extent authorized under the common law or other applicable statutory authority.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60149

Supreme Court, U.S.
FILED
MAY 12 1993
OFFICE OF THE CLERK

No. 92-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE UNITED STATES OF AMERICA,
Petitioner,

VS.

DUANE BENTON, Director of Revenue, State of Missouri
MISSOURI DEPARTMENT OF REVENUE, and the STATE OF MISSOURI,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States has a common-law right to collect prejudgment interest from a state on monies paid to the state by third parties and voluntarily reimbursed by the federal government?

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No. 92-1296

IN THE

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THE UNITED STATES OF AMERICA,
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DUANE BENTON, Director of Revenue, State of Missouri
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Respondents.

On Petition for Writ of Certiorari to the
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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a-16a) is reported at 975 F.2d 511. The opinion of the District Court (Pet.App. 17a-37a) is reported at 772 F.Supp. 453. The order of the District Court (Pet.App. 38a-40a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1992. A petition for rehearing was denied on November

16, 1992 (Pet.App. 41a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States filed this suit alleging that it was entitled to recover taxes paid by Olin Corporation (Olin) either to its vendors or the State of Missouri. The complaint requested the return of approximately eight hundred sixty-two thousand dollars ($862,000), plus interest. While the complaint did not explicitly disclose the legal theory under which the United States brought suit, it was eventually determined to be a common law claim for *indebitatus assumpsit* or unjust enrichment.

Olin is a private, for-profit corporation which entered into a contract with the federal government to operate and manage, as an independent contractor, the Lake City Army Ammunition Plant. Olin purchased, in its own name and with its own funds, the property necessary to operate the plant and was reimbursed for its purchases by the federal government pursuant to the contract. Olin made payments of sales and use taxes to Olin's vendors or Missouri on Olin's purchases and was reimbursed by petitioner for these expenditures between November 1985 and April 1988. Neither Olin nor the federal government during this time period suggested that these tax payments were inappropriate. The federal government was not contractually obligated to reimburse Olin's tax payments if an exemption from taxation was available to Olin under state law. In the complaint, however, the federal government contended that the purchases as made by Olin were not properly subject to tax pursuant to state law because the purchases were for resale.

Both parties moved for summary judgment. In its motion for summary judgment petitioner did not request the award of monetary relief. Rather, petitioner requested the District Court to establish a schedule to allow for the calculation of remedial relief. In granting petitioner's motion for summary judgment, the District Court

rejected petitioner's request regarding relief and found that the requested relief had been adequately disclosed in answers to interrogatories and deposition testimony. (Pet.App. 36a).

Both parties requested that the District Court modify its order. Among other issues, Missouri's motion attacked petitioner's calculation of taxes allegedly paid by Olin. Petitioner, in its motion agreed that the previously calculated amount was incorrect and lowered its request. Attached to petitioner's motion was the affidavit of Everett Koechner who admitted that the amount claimed due in his affidavit may not be one hundred percent (100%) accurate, but who swore that the amount of money Olin paid in sales and use taxes was "no less than" seven hundred five thousand, seven hundred seventy-two dollars and eighty-nine cents ($705,772.89). Missouri objected to this delinquent testimony in its response to the petitioner's motion, criticized the affidavit and moved that the evidence be stricken. Thereafter, the federal government supplemented its motion to alter or amend with yet another affidavit from Mr. Koechner stating that Olin had paid six hundred eighty-three thousand, six hundred thirty-one dollars and twenty-six cents ($683,631.26) in Missouri sales and use taxes. Missouri again objected to this newly disclosed and unreviewed calculation of taxes supposedly paid by Olin Corporation but the District Court awarded the federal government this amount. (Pet.App. 40a). Likewise the District Court in its second order awarded petitioner prejudgment interest on this amount at a rate calculated pursuant to Missouri law.

On appeal, the Eighth Circuit affirmed in part and reversed in part. The Circuit Court affirmed the District Court's entry of remedial relief. The Circuit Court reversed the award of prejudgment interest finding that the Debt Collection Act of 1982 extinguished any common law right petitioner had to interest against one of the several states. The position of the Eighth Circuit concerning the effect of the enactment of the Debt Collection Act has been rejected by this Court in *United States*

v. Texas, __ U.S. __, 113 S.Ct. 1631 (1993). Nevertheless, Missouri objected to the imposition of prejudgment interest because the District Court failed to give proper consideration to the positions of the parties and fairness, selected a rate of interest provided for in Missouri law for those that comply with it which petitioner had failed to do and had failed to state the date upon which interest began to accrue.

REASONS TO DENY THE WRIT

The Court should deny the writ requested by petitioner because petitioner is not entitled to common law interest against Missouri and no claim for interest can stand in the absence of a valid judgment. Petitioner brought this case to recover taxes allegedly held by Missouri on the theory of *indebitatus assumpsit* or unjust enrichment. This Court, in *United States v. California,* No. 91-2003 (April 26, 1993), decided that such a cause of action was not available to the federal government seeking the return of taxes paid to a state pursuant to state law. Petitioner has conceded that the decision in *United States v. California* impacts the validity of the underlying debt in this cause. *See* Brief for the United States, *William H. Melcher, et al. v. United States,* No. 92-1297, pp. 11-12, in the United States Supreme Court. Alternatively, the court may wish to remand this case to the Eighth Circuit in light of *United States v. Texas,* __ U.S. __, 113 S.Ct. 1631 (1993), in that the Court's decision in that case rejected the analysis of the Eighth Circuit concerning the petitioner's claim for interest. However, in compliance with the Court's order, respondents submit the following argument concerning petitioner's entitlement under the common law to prejudgment interest.

ARGUMENT

Petitioner asserts that it has a common law right to collect interest from the State of Missouri on funds its contractor allegedly paid in taxes to its vendors and the state and which petitioner voluntarily reimbursed. The relevant caselaw dictates to the contrary.

There are few cases in which the United States attempts to collect interest from one of the states. In no discovered case has the United States attempted to collect interest in the absence of the contractual relationship with the state on monies allegedly received by the state from a third party. Thus, of necessity, the argument will be by analogy.

An analysis of the common law right of the United States to interest on the debt owed by a state should begin with *United States v. North Carolina*, 136 U.S. 211 (1890). There, the United States purchased bonds issued by the State of North Carolina. The terms of the bonds were established by law. The bonds were to pay interest at a specified rate until the bonds were due. When the bonds became payable, North Carolina failed to make timely payment. The federal government requested, in addition to principal and interest payable prior to the principal due date, prejudgment interest. This Court denied the request. *North Carolina* concerned a dispute between two sovereigns involving a request for prejudgment interest on a debt properly owed by one sovereign to the other. This Court held:

> Interest . . . is not to be awarded against a sovereign government unless its consent to pay interest has been manifested by an act of the legislature, or by a lawful contract of its executive officers.

Id. at 316. The rationale stated by the Court for this rule was "public convenience." *Id.*

The Court, emphasizing this public convenience language, again addressed the propriety of requiring a political subdivision of a state to pay interest to the federal government in *Board of Comm'rs. v. United States*, 308 U.S. 343 (1939). There the federal government attempted to collect interest when Jackson County imposed property taxes upon certain Indian lands. The tax was imposed because the government changed the type of fee by which the Indians held the land. Ultimately, the government revoked the taxable fee simple deeds it had issued and reissued nontaxable trust patents. The federal government, as guardians for an Indian, sued Jackson County for return of the amount paid in property taxes plus interest. The Court, after noting the public convenience and observing that "[n]othing seems to us more appropriate than due regard for local institutions and local

interest," determined that the United States was not entitled to interest. *Id.* at 351. The Court said

> assuming . . . that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation from money withheld, but is given in response to considerations of fairness.
>
> [N]o claim of fairness calls upon [Jackson County] . . . to pay interest for the use of the money which she could not have known was not properly hers.

Id. at 352-53. The holding of *Board of Comm'rs.* is predicated on the notion that interest should not be assessed against governmental entities when they receive funds in the normal course of business without any notice that the propriety of their collection was challenged. Hence, the *Board of Comm'rs.* Court denied interest to the federal government on its claim against the political subdivision of the state.

The caselaw concerning the appropriateness of prejudgment interest charges between governmental entities continued to develop in *West Virginia v. United States*, 479 U.S. 305 (1987). There, the federal government sought interest against West Virginia on West Virginia's failure to discharge its obligation to reimburse the federal government for site preparation necessitated by a natural disaster. The state asked the Army Corps of Engineers to prepare the sites, acknowledged its debt for the preparation of the sites, but failed to make any payment. The Fourth Circuit permitted interest because this was a breach of contract action in which the amount due was liquidated, ascertained or agreed to and rejected the district court's conclusion that the court needed to balance the equities of the parties in the suit. The Court granted *certiorari* to determine whether West Virginia was required to pay prejudgment interest. The Court

determined that prejudgment interest was appropriate under "the long standing rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a *contractual obligation* to pay money." 479 U.S. at 310 (emphasis added). The Court determined under the circumstances of the case, where West Virginia voluntarily incurred a debt to the federal government and then simply refused to pay it without any claim that it was not properly due, that West Virginia was liable for prejudgment interest.

Recently, this Court decided that the common law concerning the payment of interest on debts owed by states to the federal government survived the enactment of the Debt Collection Act and rejected the view of several circuit courts, including the Eighth Circuit, that the Act abrogated the common law. *See United States v. Texas*, __ U.S. __, 113 S.Ct. 1631 (1993). The Court, quoting *West Virginia v. United States*, said there is a "long standing rule that parties owing debts to the Federal Government must pay prejudgment interest where the underlying claim is a underlying contractual obligation to pay money." 479 U.S. at 310. The Court also noted that

> [t]he duty to pay prejudgment interest under the common law, however, is by no means automatic. Before imposing prejudgment interest, the courts must weigh the competing federal and state interest .... And instead of imposing a pre-established rate of interest, the district courts retained discretion to choose the appropriate rate in a given case.

United States v. Texas, 113 S.Ct. 1635-36.

Under the common law principles enunciated by this Court petitioner is not entitled to receive prejudgment interest from Missouri. Initially, it must be noted, that the federal government does not have a contractual relationship with Missouri in regard to the funds upon which it seeks the payment of prejudgment interest. In fact, it has no relationship with Missouri at all with

regard to these funds. Missouri received these funds either as direct payments from Olin, a federal contractor, or from Olin's vendors, as part of their payment of Missouri sales taxes. In short, Missouri possesses funds paid to it by third parties which are wholly unrelated to the federal government. No contract controls Missouri's receipt or retention of these funds. Rather, the receipt and retention of these funds is controlled by Missouri law.

Additionally, the sum upon which petitioner seeks the payment of interest was never a sum certain. When the federal government filed its motion for summary judgment in the district court, it did not ask the court for monetary relief. Rather, the government asked the district court to establish a schedule for the calculation of remedial relief. The district court rejected this request and concluded that the federal government could collect from Missouri the amount of money disclosed in petitioner's interrogatory answers.

In the complaint, the government told Missouri that it was owed approximately $862,000. In response to Missouri's first set of interrogatories, the government stated that Olin had claimed a refund of $862,043 and incorporated this amount into its interrogatory responses. At the deposition of Everett Koechner, an Olin employee testifying on behalf of the federal government, he stated that the refund amount claimed due, approximately $862,000, was accurate. Nevertheless, Mr. Koechner testified elsewhere in his deposition that the amount due was really $858,983. Inexplicably the affidavits submitted by the federal government in support of its motion for summary judgment claimed that Olin made payments of approximately $862,000 in sales and use taxes. The federal government, in its motion to alter or amend the judgment, attached an affidavit from Mr. Koechner which admitted that the amount claimed therein may not be 100% accurate. However, Mr. Koechner swore that the amount of money Olin paid in sales and use taxes was "no less than"

$705,772.89. Missouri objected to this delinquent testimony in its response to the government's motion, criticized the affidavit, and moved that the evidence be stricken. Thereafter, the federal government supplemented its motion to alter or amend with yet another affidavit from Mr. Koechner stating that Olin had paid $683,631.26 in Missouri sales and use taxes. Missouri again objected, but the district court awarded the federal government this amount.

Importantly, Mr. Koechner's affidavits do not state whether the amount allegedly paid by Olin was paid to Olin's vendors or directly to Missouri. This is important because this is purportedly an action sounding in quasi contract or *indebitatus assumpsit*. Under such legal theories the federal government must show what Missouri received; not what Olin parted with. Missouri law permits vendors who collect Missouri sales tax to retain 2% of the gross taxes collected. Section 144.140, RSMo. These vendors are not Missouri's agents. The federal government's failure to present any evidence concerning the amount of money actually received by Missouri prevents any rationally based interest recovery by the federal government.

Of course, the most important factor in determining whether common law prejudgment interest should be awarded to the federal government against a state involves the competing equities of the parties and a weighing of the federal and state interests. The federal government is not entitled to interest on whatever amount of money Olin paid in sales and use taxes.

> The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.

Board of Comm'rs., 308 U.S. 343, 352. Consequently, the award of interest in this case, if available, is left to the discretion of the trial court. *United States v. Imperial Food Imports*, 834 F.2d

1013 (Fed. Cir. 1987). In *United States v. California State Bd. of Equalization*, 650 F.2d 1127 (1981), *aff'd*, 456 U.S. 901 (1982) (*CSBE*), the federal government asserted that sales taxes imposed on its lease of data processing equipment was an unconstitutional tax. The federal government prevailed on the substantive issue and requested an award of prejudgment interest. The court held:

> The award of prejudgment interest in a case under federal law is a matter left to the sound discretion of the trial court. . . . Awards of prejudgment interest are governed by considerations of fairness . . . and are awarded when it is necessary to make the *wronged* party whole.

Id. at 1132 (emphasis added; citations omitted). *See also United States v. Atkinson*, 575 F.Supp. 791 (Ct. Int'l. Trade 1983), *aff'd*, 748 F.2d 659 (Fed. Cir. 1984), where the court held:

> The need to compensate an injured plaintiff is a major factor in determining whether prejudgment interest should be awarded. . . . Since the injury to plaintiff is in good measure related to its own laxness in initiating this action, fairness does not dictate the granting of prejudgment interest to the plaintiff.

Id. at 795-96.

The district court's order concerning prejudgment interest is unclear in that it does not address the date interest began to accrue and which provisions of § 144.190 are applicable to the government. It is not appropriate to allow the federal government to collect interest on taxes paid by Olin between November 3, 1985 and April 1, 1988. Olin voluntarily paid these taxes believing them to be due. The federal government reimbursed Olin for its payment of these taxes, apparently again believing them to be due. It was not until on or about April 1, 1988 that the government and Olin decided that the purchases of the type on which

these taxes were paid were excluded from state tax pursuant to state law, as purchases made for the purpose of resale, and even later that the federal government actually contested the taxability of the transactions at issue.

As did the governmental entity in *Board of Comm'rs.*, Missouri accepted the tax payments made by Olin and its vendors in reliance on their conclusion that the taxes were properly due. No notion of fairness under the *Board of Comm'rs.* standard suggests that interest should be afforded for tax payments voluntarily made. Neither Olin nor the federal government have been wronged by Missouri under the *CSBE* standard. Rather, Missouri merely accepted the taxes Olin and its vendors conceded to be due. Certainly no contractual basis exists for the imposition of interest against Missouri. Considering Missouri's unquestioned good faith in the acceptance of these taxes and the district court's concession that the issue of the taxability of the transactions at issue is one of first impression in Missouri (Pet. App. 28a), fairness does not suggest that the federal government should receive interest on its voluntary reimbursement to Olin.

Moreover, the federal government should not receive prejudgment interest at the relatively high rate provided by Missouri tax law as granted by the district court. Should the Court determine that it was appropriate to award the federal government interest, Missouri suggests that the rate awarded by the district court is unreasonable. The Court should not permit the federal government to collect interest from Missouri under the terms of §§ 144.190 and 32.065, RSMo. Such an award is inappropriate because the statutory provision for interest contained therein is for the benefit of those who comply with the terms of Missouri law. Missouri law provides that a refund of taxes paid is only available to a person who is legally obligated to remit the tax; that claims for refund must be in writing, under oath and state with specificity the grounds on which the refund is sought; and that these claims be filed within three years of the

alleged overpayment. Section 144.190. The federal government did not comply with these requirements and has asserted that it was not subject to the restrictions imposed in § 144.190. It would be inequitable to allow the federal government the benefit of Missouri's revenue laws, while permitting it to avoid the law's burdens, including the statute of limitations.

Missouri's general law concerning interest is somewhat less generous than § 144.190.

> Absent statutory or contractual authorization, prejudgment interest is not allowed on an unliquidated claim. . . . Recovery of prejudgment interest may be allowed only for liquidated claims under these circumstances for an amount 'readily ascertainable by computation or by determination according to a recognized standard.'

Continental Bank & Trust Co. v. American Bonding Co., 630 F.2d 606, 612 (8th Cir. 1980) (interpreting Missouri law). The federal government did not assert that its claim was liquidated nor, as discussed above, is the amount of the claim readily ascertainable. Hence, interest should not be permitted at all. If interest is permitted, under Missouri law, it should be at no higher than the statutory rate of 9% per annum. Section 408.020, RSMo. However, in other disputes between sovereigns interest awarded has been as low as 6%. *United States v. State Tax Commission,* 645 F.2d 4 (5th Cir. 1981).

The federal government is not entitled to prejudgment interest under the common law. Missouri had no contractual relationship with petitioner in regard to the funds on which interest is sought and the principal amount of the supposed debt is not a sum certain. Most importantly, fairness, equity and the relative sovereign positions of the parties with regard to the disputed nontaxability under state law of the transactions forming the underlying debt do not support the imposition of prejudgment interest.

CONCLUSION

Missouri, for the reasons set forth above, respectfully requests that the Petition for Writ of Certiorari filed by the United States be denied.

Respectfully submitted,

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